

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 25, 2006

**STATE OF TENNESSEE v. JONATHAN E. WILLIAMS**

**Direct Appeal from the Circuit Court for Blount County**  
**No. C-14713     D. Kelly Thomas, Jr., Judge**

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**No. E2005-02507-CCA-R3-CD - Filed November 2, 2006**

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Pursuant to a plea agreement, the defendant, Jonathan E. Williams, pled guilty to theft over \$60,000, a Class B felony and agreed to an eight-year sentence with the manner of service to be determined by the circuit court. After a sentencing hearing, the court ordered the defendant to serve his sentence in confinement. On appeal, the defendant challenges the court's denial of alternative sentencing. Following our review of the parties' briefs and applicable law, we reverse and remand for entry of a modified sentence.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Julie A. Rice, (on appeal) Knoxville, Tennessee, and (at trial) Mr. Gerald Russell, Maryville, Tennessee and Stacey Nordquist, Assistant District Public Defender, for the appellant, Johnathan E. Williams.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Tammy M. Harrington, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

On August 9, 2004, the defendant pled guilty to theft over \$60,000 and agreed to an eight-year sentence with the manner of service to be determined by the circuit court. A sentencing hearing was held on November 8, 2004. At the hearing, the defendant's presentence report was admitted into evidence. According to the report, the defendant started to work for Denso Manufacturing in October of 2000. In January of 2002, the defendant came up with an idea to create shipment

invoices from a fictitious freight company and bill Denso for non-existent shipments. He struggled with the idea for a few months but eventually started the scheme in July 2002. At this time, he opened up a post office box and bank account in order to receive the checks mailed from Denso's freight-bill processing company located in Michigan. He cashed the first check in August 2002. In March 2003, he introduced his former girlfriend, Amanda Cunningham, to the scheme. The scheme lasted until July 2003 with the defendant stealing about \$80,000 from Denso.

The defendant was caught after his employment with Denso terminated. He left Denso after he was written up by management for driving a company vehicle to pick up his daughter from daycare. After leaving Denso, he got into debt and decided to send another batch of fake invoices via United Parcel Service. His scheme was discovered shortly thereafter. Denso included a victim impact statement in the presentence report. Denso described the defendant's thefts as a betrayal of the personal trust of the company, its management, coworkers, and friends. Denso submitted that its employees had to work extra hours in order to discover the extent of the damage the defendant caused. Denso sought restitution of the full amount stolen as well as "an appropriate sentence." The presentence report showed that the defendant had a minimal criminal history consisting of a few traffic offenses, one reckless driving conviction, and a pending charge for simple assault.

The defendant testified on his own behalf. According to the defendant, he had completed high school, taken some college courses, and had received commendations while serving in the Navy for two years. The defendant stated that his actions "completely destroyed [his] life." He said that "its been unbearable at times. It's been very difficult to wake up some days and face the day." He admitted he made a huge mistake and hurt innocent people.

The defendant testified that he currently lived in Georgia with his eight-year-old daughter for whom he is the sole, exclusive custodian. He stated that he had been gainfully employed for the last seven months and estimated that he would receive over \$40,000 for the year. The defendant submitted he would pay \$600 a month in restitution until the \$80,000 was paid off. He also submitted that he would increase the amount of the monthly payment as he grew professionally. He noted that he was willing to live under the court's scrutiny if given probation and indicated that he was willing to advise his probation officer of his raises in order to adjust his restitution accordingly. He also asserted that he would perform more than one hundred hours of community service a year. The defendant claimed, however, that he currently had no assets from which to pay restitution. He also claimed that he had not paid any restitution to Denso because he was told not to. He further claimed that he was unable to save any money for restitution due to being unemployed and incurring various debts.

The defendant testified that he was getting counseling from his church and professional counseling from Behavioral Solutions in Georgia. He said he went to his old church and his former girlfriend's church and confessed his wrongdoing openly. He also stated that he emailed officials at Denso in April of 2004 to express regret for his actions. The defendant explained that he emailed the officials because he "felt the need to tell them [he] was very sorry for what [he] had done, very sorry for all the pain and hurt that [he] caused them, both personally and professionally." In

response, he was told by Denso officials not to contact them. The defendant responded, promising that he would no longer contact any Denso employees. His attorney also told him not to have contact with any Denso employees. However, the defendant acknowledged he did not keep his promise. He left a message with his former supervisor a week before his sentencing hearing stating he wanted to come by her house. As he explained, after confessing his wrongdoing at church, he wanted to express to her his remorse and regret.

The defendant testified that he stole the money to make his daughter's life more comfortable even though he was making nineteen dollars an hour at Denso. He conceded however that he used some of the money to pay for vacations he took with his former girlfriend to Nashville, North Carolina, San Diego, and the Caribbean. The defendant admitted that he sent his former supervisor a postcard thanking him for one of the trips after he had quit working for Denso. The defendant estimated that his former girlfriend received the benefit of about \$20,000 of the stolen money. He asked for mercy for his former girlfriend because he blamed himself for her predicament.

The defendant admitted that he had a pending assault charge against him. He explained that he and his former girlfriend had gotten into an argument over their impending breakup which led to some physical contact. As a result, she took out a restraining order and signed a warrant against him for simple assault. The defendant asserted that since that time, he has stayed away from his former girlfriend.

Michael Hopson, the defendant's former neighbor in Knoxville, testified that he and the defendant were close friends. According to Hopson, the defendant was "remorseful for what he's done and that he's determined to do right in the future and live an upright life and make restitution." Hopson stated the defendant "showed a great deal of remorse, a great deal of shame and embarrassment." Hopson noted that the defendant loved his daughter and was committed to her. Jane Ann Himes testified that she had known the defendant for four years. She stated that the defendant was "devastated and is working hard to get his life back together and to get onto the right track."

Reverend Vernon Scarborough testified that the defendant attended his church with his former girlfriend for a while. He recalled that after the defendant was caught stealing money, he confessed to committing wrongs, but he did not describe what they were. Scarborough acknowledged that the defendant's former girlfriend normally attended his church but was not in attendance on the day the defendant confessed.

In determining the manner of service of the defendant's sentence, the trial court stated the following:

I've considered the testimony that I've heard, I've considered the severity of the offense, the way that the offense was committed. I've looked at the sentencing principles, the likelihood of rehabilitation, and your record, which is minimal other

than this assault arrest and order of protection, which I'll talk about in a moment. [I've considered] [e]ducational background and all those kinds of things.

The amount of money stolen was huge. And the reason that I have question about the likelihood of rehabilitation is because taken as true all the professions of remorse and grief, et cetera, that you've made - - which I have no reason to doubt you. I believe you - - but when you weigh that against what you've actually done, you've done nothing that helps the person you stole from. You've done things that help your daughter, which is wonderful. And you've done things to help yourself to put you in a position to pay your [former] employer back over about ten years or eight. Nothing specific about that. And you have no money available to make any kind of substantial payment on that restitution. And I think if you were truly rehabilitated, you would have . . . made everything secondary to trying to make [Denso] as whole as possible over the last year. Instead, you have wanted to maintain a certain lifestyle and relocate to get a good job, which is great, but now you're paying debts and things you've incurred over the last year, which out of a \$45,000 a year salary you can only pay \$600 a month. And that's not good.

. . . .

The other thing is, the way you've behaved since. You want to deal with your guilt and grief even if [your former supervisor] doesn't want you to, even if you've said you won't . . . . That's a selfish approach to take to grief . . . . And to the point with your co-defendant of having an order of protection issued against you and being charged with a crime while this sentencing is . . . pending. So, that leads me to the conclusion that a probationary sentence is not appropriate.

## **ANALYSIS**

The defendant's sole issue on appeal is whether the trial court erred in denying alternative sentencing and imposing full confinement. Specifically, the defendant submits that he should have received some form of alternative sentencing because his theft conviction was a non-violent, property crime which was not so serious as to require full confinement. He also submits that the court did not properly weigh the mitigation evidence such as his remorse, rehabilitation efforts, current employment, and desire to make restitution and perform community service. He further submits that the court's findings reflect a perception that he was punished with confinement because he failed to pay restitution prior to sentencing. He argues that the court's decision in imposing a lengthy period of confinement is not the "least severe measure necessary" to effectuate sentencing purposes.

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the

affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

A defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). However, this presumption is unavailable to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, or has failed past efforts at rehabilitation. *Id.* § 40-35-102(5); *State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Pursuant to Tennessee Code Annotated section 40-35-103, a trial court is "encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service." However, a trial court may determine incarceration rather than alternative sentencing is appropriate if the evidence shows that:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C). As part of its determination, the trial court may also consider the defendant's potential or lack of potential for rehabilitation. *Id.* § 40-35-103(5). Additionally, the defendant's lack of truthfulness or candor is an appropriate consideration as it relates to the defendant's potential for rehabilitation. *State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. § 40-35-103(2); *State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

In this case, the defendant was eligible for alternative sentencing because his actual sentence was eight years or less and the offense for which he was sentenced was not specifically excluded by

statute. *See* Tenn. Code Ann. §§ 40-35-102(6) & -303(a); *State v. Byrd*, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993). However, the defendant was not entitled to the presumption of favorable candidacy for alternative sentencing because he pled guilty to a Class B felony. Tenn. Code Ann. § 40-35-102(6). As a result, the burden of establishing suitability for alternative sentencing rested with the defendant. *State v. Curtis Lee Thames*, No. E2005-00895-CCA-R3-CD, 2006 WL 1097447, \*2 (Tenn. Crim. App., at Knoxville, April 7, 2006) (noting that a defendant convicted of a Class B felony has the burden of proving his worthiness for alternative sentencing).

From the record in this case, it is clear that this defendant did not have a long history of criminal conduct such that confinement was necessary to protect society. *See* Tenn. Code Ann. § 40-35-103(1)(A). It logically follows that “[m]easures less restrictive than confinement” have not “frequently or recently been applied unsuccessfully” to this defendant. *See id.* § 40-35-103(1)(C). Indeed, it appears from the record that the trial court’s sentencing determination was dependant on its findings regarding the severity of the offense and the defendant’s rehabilitation potential.

Looking at the court’s findings on the record, we infer that the court denied alternative sentencing in part because of the severity of the offense, finding that the “amount of money stolen was huge.” Initially, we note that a court should not base its decision to deny alternative sentencing solely on the amount of money stolen, especially if the amount stolen determines the offense for which a defendant was convicted. *See State v. Millsaps*, 920 S.W.2d 267, 271 (Tenn. Crim. App. 1995). As we have previously observed, the legislature, in enacting our sentencing statutes, did not foreclose consideration of alternative sentencing options for theft offenses involving large sums of money. *See State v. Barbara D. Frank*, No. 03C01-9209-CR-00303, 1993 WL 539401, \*5 (Tenn. Crim. App., at Knoxville, Dec. 22, 1993); *see also State v. Hartley*, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991) (stating that once the legislature authorized the use of sentencing alternatives for an offense, trial court may not summarily impose a different standard and deny probation based upon the defendant’s guilt for that offense). We further note that if the serious nature of the offense forms the basis for the denial of alternative sentencing, the “circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement.” *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (internal quotations omitted); *see also State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995). Indeed, while the nature of the offense is an important consideration, it is but one of a number of considerations by which the court must be guided in determining whether to grant or withhold alternative sentencing.

While it is true that the defendant stole over \$80,000 from his employer, the record reflects *inter alia* that the defendant was remorseful, accepted responsibility for his actions, desired to pay restitution and perform community service, was employed, and had a minimal criminal record. As such, we fail to find adequate support in the record to conclude that the circumstances of the theft offense, albeit serious, were so especially offensive, reprehensible or of an exaggerated degree that it outweighed all the evidence in favor of alternative sentencing. In sum, the circumstances of this offense as weighed against all the mitigation evidence proffered by the defendant do not warrant a

sentence of total confinement. *See, e.g., State v. Charles Stillwell*, No. W2000-00392-CCA-R3-CD, 2001 WL 468659 (Tenn. Crim. App., at Jackson, May 01, 2001) (alternative sentence granted for theft of \$150,000); *Millsaps*, 920 S.W.2d at 271-72 (alternative sentence granted for embezzlement from employer of \$80,220); *State v. Lynda Gayle Kirkland*, No. 03C01-9606-CR-00248, 1997 WL 55936 (Tenn. Crim. App., at Knoxville, Feb. 12, 1997) (alternative sentence affirmed for theft from employer of \$202,096.75); *but cf. State v. Jessica Trotter and Andrew Sheriff*, No. W2004-00656-SC-R11-CD, 2006 WL 1768422 (Tenn. June 29, 2006) (holding that circumstances surrounding theft of nearly \$500,000 was so “reprehensible, offensive or otherwise of an excessive or exaggerated degree” that it outweighed the mitigating evidence of the defendants’ good character and remorse).

The record also reflects that the trial court denied alternative sentencing in part because the defendant had not made restitution prior to sentencing and had exhibited selfish behavior in dealing with his guilt. The court commented that these facts reflected poorly on the defendant’s rehabilitation potential. Upon review, we note that a trial court cannot deny alternative sentencing based upon a defendant’s *inability* to pay restitution. *Millsaps*, 920 S.W.2d at 272. We also note that such a decision is counterproductive because a sentence of confinement reduces any potential for a defendant to pay restitution. *See id.* Moreover, such a decision “would be contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.* However, we have previously determined that evidence of the defendant’s *unwillingness* to pay restitution can be considered in assessing the defendant’s potential for rehabilitation. *See State v. Larry Wilkins*, No. M2000-01225-CCA-R3-CD, 2001 WL 717368, \*8 (Tenn. Crim. App., at Nashville, June 22, 2001); *State v. Wanda Walters*, No. 88-174-III, 1989 WL 25792, at \*2 (Tenn. Crim. App., at Nashville, Mar. 23, 1989). Here, the record reflects that after his arrest the defendant became unemployed for a time and incurred considerable debt taking care of himself and his daughter. Approximately, seven months preceding the sentencing hearing, he got a job in Georgia. At the hearing, the defendant offered to pay \$600 per month in restitution and increase the amount when he received increases in his compensation. Given the available evidence in the record, we conclude that the defendant’s failure to pay restitution prior to being sentenced resulted from an inability to pay and not a willful refusal to pay.

Because we conclude that the court’s denial of alternative sentencing was not supported by the record, we modify the defendant’s eight-year sentence.<sup>1</sup> Accordingly, the defendant is to serve ninety (90) days in the local jail or workhouse followed by supervised probation for the remainder of his sentence. The defendant will be required comply with all other reasonable conditions of probation which are deemed necessary by the court including payment of restitution. In ordering restitution, the court shall specify the amount of time and payment and may permit payment or

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<sup>1</sup>As a practical matter, it is in the public interest to encourage offenders to take steps toward restitution and rehabilitation, as well as to punish them for the offense. Therefore, the trial court’s decision to impose full confinement in this case has effectively discouraged legitimate efforts at rehabilitation and restitution of this defendant, and has reduced the incentive of like offenders to be candid with the court and to cooperate. Obviously, cases exist in which the circumstances surrounding a theft offense and circumstances surrounding a defendant call for a sentence of total confinement, but such is not the case before us. *See generally*, Tenn. Code Ann. §§ 40-35-102, -103.

performance of restitution in installments. Tenn. Code Ann. § 40-35-304. The court may not, however, establish a payment or schedule extending beyond the maximum statutory term of probation supervision imposed for the offense. *Id.* Furthermore, the amount of such restitution payments is to be based upon the defendant's financial resources and ability to pay. *Id.*

### **CONCLUSION**

Based upon the record and the parties' briefs, we reverse the circuit court's denial of alternative sentencing and modify the defendant's sentence as reflected in this opinion. The case is remanded for entry of sentence consistent with this opinion.

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J.C. McLIN, JUDGE